NO. 47101-9-II

COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

SHARON D. ROSE, in her capacity as Personal Representative of the Estates of Wilma D. Rose and Robert D. Rose, deceased

Appellant

v.

JOHN C. ZIMMERMAN, JR. and SUSAN LASALLE, husband and wife and their Marital Community and FNM CORP., a Washington corporation

Respondents

REPLY BRIEF AND RESPONSE TO CROSS APPEAL OF APPELLANT

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II. ARGUMENTS IN REPLY

Since the Defendants/Cross Appellant combine their Response to the Appellant's Brief in one document, this Reply to Defendants' Brief comprising pages 1 through 23; and the Response to the Cross Appeal comprising pages 24 through 33 are also combined in one document.

A. Defendants argument (Defendants' Brief, page 14 and 21) that the Rose Joint Venture never had a beneficial interest in the 5 acre parcel is not supported by substantial evidence on any issue decided by the Trial Court granting relief to the Defendants.

The Defendants arguments that substantial evidence supported Findings of Fact 8 and 10 in their attempt to avoid the violations of the Dead Man's Statute based on legal descriptions, documentary evidence and the personal knowledge of John Zimmerman Jr. ignores that the Trial Court limited the issues to be tried to the following:

> "whether the Plaintiff's claims are precluded by the applicable Statute(s) of Limitations and /or whether the doctrine of *res judicata* bars the Plaintiff's claims based on the May 11, 2010 Settlement Agreement and subsequent dismissal with prejudice of all claims raised under Pierce County Cause No. 10-2-076102" (Letter of Decision dated December 11, 2014, page 1, second paragraph)

Although the issues reserved for the trial did not include the issue of standing of Plaintiff Sharon Rose to bring her action, the Defendants presented the issue in their trial brief (Defendants' Trial Brief, page 2

fieled12/1/2014 and designated as a Supplemental Clerk's Paper on August 20, 2015 pursuant to RAP 9.6(a)CP). The Trial Court agreed to hear testimony over Counsel's objection but stated it would address the issue of more testimony if needed (RP 3, 4 and 5) but never did so. The Trial Court also found in the same letter of Decision that no findings were made regarding standing raised by the Defendants at trial because it was not necessary to the resolution of the case. (Letter of Decision dated December 11, 2014, page 1, second paragraph). Consequently, by these decisions of the Trial Court, the Plaintiff was effectively denied the opportunity to present evidence contrary to Defendants' arguments in their Brief which would have consumed several more days of trial time not necessary by the Court's ruling at the start of the trial. (RP 4: 13-22).

Standing means that every action must be brought in the name of a real party in interest. CR 17(a). In order to enforce private rights that person must show he has some real interest that is present and substantial in the cause of action. *Kim v. Moffett,* 156 Wn. App. 689, 698, 234 P. 3d 279 (Div. II 2009) The lack of standing position of Defendants was based solely on the argument that the disputed 5 acre parcel was never a parcel to which the Rose Joint Venture ever had a beneficial interest, so they argue, had no real, present and substantial interest in the subject real property (the disputed 5 acre parcel) as standing to bring the claims at all.

The decision by the Trial Court with respect to the Statutes of Limitations where the discovery rule applied could therefore not have been based on her lack of an interest in the 5 acre parcel, or the decisions would have been unnecessary, if Defendants position is correct.

Consequently, whether the 5 acre parcel's Legal description differed from a separate 12 acre parcel whether based on documents or the personal knowledge of John Zimmerman, Jr., notwithstanding reliance on testimony properly omitted for violations of the Dead Man's Statute is, irrelevant. Because the Trial Court limited the issues to be tried in the mini-trial and did not even consider the standing issue, the Plaintiff was denied as then unnecessary, the opportunity to present evidence such as the testimony of other principals in the AMJV development of 85 acres that they had been continually told that 4 of the disputed 5 acre parcel was at all times included in the development. The declarations of those principals were attached to the Plaintiff's Complaint filed on February 28, 2013. (CP: 303-390).

Unless the record sustains with substantial evidence that Sharon Rose as Personal Representative of the Rose Estates had prior knowledge of these facts at the applicable accrual time requirements of the respective causes of action, the argument that she is barred from bringing the actions must fail. Defendants point to no such knowledge as sustained by

substantial evidence. The Defendants attempt to place this knowledge in her or her parents Robert and Wilma Rose based on the constructive notice of the recording of the Deed to the disputed 5 acre parcel from PT III to the Zimmermans in July 2000. That argument fails. The recording of a deed to real property is constructive notice only to persons acquiring subsequent not antecedent interests and have a reason to refer to the record. *Aberdeen Federal Savings & Loan Association v. Hanson,* 58 Wn. App. 773,777, 794 P. 2d 1322(Div. II, 1990).

The interest of the Rose Joint Venture arose on January 1, 2000, clearly antecedent to the recorded deed to the Zimmermans. Until Sharon Rose became aware of the transfer in August, 2010, as this Brief will amply demonstrate hereafter, well within the three year statute of limitations, she had no reason to refer to the public record.

Defendants have not and cannot point to any substantial evidence on the record from trial that Robert or Wilma Rose ever had a reason to refer to the record and certainly no knowledge of the differences between legal descriptions. What the trial Court may eventually decide when the issue of what real property was or was not included in the Rose Joint Venture comes before it, until the resurrected standing arguments with an attempt to get around the Dead Man Statute arguments to prove accrual of the causes of action is futile.

B. Defendants' argument that Finding of Fact 11 was Supported by substantial evidence simply misstates the evidence in the record as support for Finding of Fact 11 that her participation in the advisory group gave her knowledge of any elements of her causes of action

The trial Court in Finding of Fact 11 simply misstated the facts found because contrary to the finding that the group was formed in 2009, all the evidence presented at trial was clear and un-contradicted by any witness that the advisory group held no meetings until after August 6, 2010 when it was formed and the first meeting held on August 10, 2010, this was confirmed by the testimony of John Zimmerman, Sr.(RP 365, lines 5-14).

Consequently there was no evidence substantial or otherwise that the group was formed in 2009. Consequently, if the group was not formed until August 6, 2010, none of the "substantial evidence" Defendants offer on page 17 of their Brief to sustain the Finding could have occurred in the trial record since whatever action she took in voting to remove John Zimmerman Jr. from his management position in February 2010; See Ex. 17) it was not as the Court incorrectly found in Finding of Fact 11 that she did so as a member of the Advisory Group. This is significant because

Sharon's vote to oust John Zimmerman Jr. in February 2010, was based on disagreements over his refusal to even consider the Jay Hutton proposal for the 85 acre development. See the members' resolution dated February 4, 2010. (Ex. 18). No vote to oust John Zimmerman Jr. in February, 2010 was a function of the advisory group as the Court erroneously found, a time which would have been outside the statute of limitations if accrual occurred at that time. Whereas the discovery that did occur in August 2010 was within the applicable statutes of limitation.

Sharon Rose in her testimony explained in detail what was discussed in the January 22, 2010 meeting. The reason for the dismissal of John Zimmerman, Jr. was based solely on his refusal to even consider the Jay Hutton proposal. (RP371, line 12 through RP 374, line 3). She also testified without any rebuttal from any witness that there had been no mention in the January 22, 2010 of John Zimmerman, Jr. acquiring the 5 acre parcel or any discussion of the later to be filed 2010 lawsuit by FNIG. (RP 374, lines 4-17). Therefore there was no evidence, substantial or otherwise to support the Trial Court's Finding of Fact 11.

C. There was no evidence presented by any witness at trial

That Sharon Rose was aware or should have been aware of the lawsuit in 2010 before it was filed so no substantial evidence supported Finding of Fact 12

The evidence was un-contradicted that Sharon Rose was present at every advisory group meeting. (RP 361:11-13) However since the advisory group was not formed until August 6, 2010 and within the accrual discovery time for statute of limitations purposes, the claims she discovered no sooner than the formation of the group and its first meeting, unless otherwise shown, were not barred.

She was asked on direct if she knew a lawsuit was going on but she answered that she didn't know what the dispute was about, not that she was aware of the lawsuit but that she was aware there were problems with the managers and a dispute over some acreage not specified (RP133:1-25, RP 135: 1- 7).

A careful reading of that testimony reveals nowhere that she was aware prior to or at the time the lawsuit was filed of its existence as the Trial Court erroneously found in Finding of Fact 12. She testified that at some point (not specified as to when), that she knew about it after the meetings started. (RP: 8-14). Then to confirm the extent of her later acquired knowledge she testified that in her meetings with Stuart Morgan that he didn't know of it because she didn't know of it. (RP 139:4-5).

Additionally in the meeting between Stuart Morgan and the Semkes, on March 17, 2010, two days before the FNIG lawsuit was filed, there was no mention of it to Morgan. (RP: 318: -22). And finally on this point, the lawsuit was settled on May 5, 2011 (RP 362: 10-18) and the Plaintiff's action was filed within three years on February 23, 2013. Consequently there was no substantial evidence Sharon Rose knew of the existence of the 2010 lawsuit in time to earlier bring her claims.

D. The Deadman's Statute was not waived by Sharon Rose And the error of admitting testimony of John Zimmerman, Jr. as to the location or inclusion of the property in the Rose Joint Venture was not harmless.

Mr. Zimmerman, Jr. attempted to explain that he provided Information on the sale of the 5 acre parcel to himself by the inclusion of the sale information in the year 2000 Rose Joint Venture K-1 being passed through from the disclosure in the year 2000 AMJV tax return. Plaintiff's counsel objected based on the Deadman's Statute and that objection was sustained. (RP 166: 1-23). Then Counsel for Plaintiff made a standing objection to any testimony concerning any transactions with the deceased Roses or communications with them which the Court acknowledged. (RP168:21-25, RP 169: 1-3). Accordingly, any testimony thereafter concerning what the AMJV tax return or the Rose Joint Venture tax returns for the year 2000 cannot serve as substantial evidence of what was

or what was not included in the Rose Joint Venture nor as to any knowledge the Roses or Sharon Rose had for discovery accrual purposes.

The Grantors of the Statutory Warranty Deed dated July 24, 2000, by which the 5 acre parcel was conveyed to John Zimmerman Jr. were PT III for a 55% undivided interest and the June Kerr Living Trust for a 45% undivided interest.(Included in Exhibit 22) The deed was signed by FNM Corp., as General partner of PT III, an entity controlled by John Zimmerman ,Jr. and June Kerr, John Zimmerman, Jr's aunt. However, the sale was mistakenly reported on AMJV's 2000 federal tax return, a tax return prepared by John Zimmerman, Jr. If there was a disclosure of the sale of the 5 acre parcel to John Zimmerman, Jr. contained in the year 2000 federal income tax return of AMJV and its K-1 to partners, including Port of Tacoma Mobile Estates, "PT III", it stopped there. Such disclosure did not reach the Rose Joint Venture nor Robert and Wilma Rose. Exhibit 23 shows that they were not among those who received a copy of the tax return or K-1s from AMJV. Neither would they have received a copy of PT III's tax return or K-1s from PT III because they were not a partner in PT III. (page 294, line 14-25) and further, that the Roses individually were not partners in PT III (page 299, line 9-25). PT III was only obligated to supply K-1s to its partners (IRS Reg.1.6031[b]-IT). The Court ruled

specifically without challenge, that the Rose Joint Venture was not a partner in PT III .

The Defendants argue in their Brief that notwithstanding the objections later on, Sharon Rose waived any objections to the Deadman's Statute by the introduction of documents or in her testimony. (Defendants' Brief, page 18). The Defendants point to no specific testimony from documents other than a vague reference to Declarations by her in Response to a trial court motion, which although designated as Clerk's papers were not admitted into evidence in the mini trial.

A careful examination of Sharon Rose's Declaration in support of Plaintiff's Response to Defendant's Motion for Summary Judgement (CP 391-427) and her Declaration in Support of Plaintiff's Response to Defendant's Motion to Dismiss (CP 428-478) offers no testimony of communications with the deceased Roses or a transaction between herself and the deceased Roses in violation of the Deadman's Statute. The content of her statements so read would not be within the scope of the statute, and did not therefore constitute a waiver. *Nickels v. Nickels,* 2001 Wash. App.557 (Div. I, 2001).

In those declarations, there was no mention of the tax returns of AMJV or the location of the property included or not in the Rose Joint Venture. Also there is no mention of Sharon Rose's knowledge of the

July 2000 sale of the Five- Acre Parcel until she discovered it in the first meeting of the Advisory Group on August 10, 2010 when she received a copy of Mr. Zimmerman Jr.'s memo in which he admitted the sale for the first time. The testimony of John Zimmerman Jr. using the tax returns of AMJV and the Rose Joint venture in the year 2000 did not pass muster after being properly objected to by the standing objection and Plaintiff's Counsel never cross examined the witness concerning what was obviously a transaction with the deceased Roses concerning the content of these tax returns, so no waiver occurred by Plaintiff concerning this clearly objectionable testimony.

Also the testimony by John Zimmerman Jr. as to the location of the property included in the Rose Joint Venture (RP 227: 18 to RP 230: 13) was clearly a transaction with the deceased Roses and came after Plaintiff's Counsel's standing objection as to conversations and any transaction with the deceased Roses and not waived. (RP 168: 24-169:3)

Defendants point to Sharon Rose seeking legal counsel in the fall of 2004 regarding her parents' investments as a waiver. (Defendants' Brief page 21) The testimony shows that the seeking of legal advice from the Farr law firm in 2004 had to do primarily with estate planning and did not involve a transaction by the deceased persons with the Defendants, (RP 64: 18-25, RP 65:1-15) The reference to her meeting with Megan Farr

related to court issues was stated as only potentially aware with no specifics to tell us what she knew then. (RP 70: 17-20). The argument that she waived the Deadman's Statute by her testimony about her understanding of the meaning of the Rose Joint Venture Agreement cannot be found by any reference of Defendants to the portion of the transcript on which they rely (RP 64 65). This also was a question asked by Defendants' Counsel and not in response to a voluntary disclosure from her side. All the cases cited by Defendants on page 21 of their Brief, *Zvolis v. Condos,* 56 Wn. 2d 275, 277, 352 P. 2d 809 (1960) and *O'Steen v. Estate of Wineberg*, 30 Wn. App. 923, 935, 640 P. 2d 28 (Div. II. 1982) are cases where the party in interest for the deceased person (in this instance Sharon Rose) elicits testimony concerning communications or a transaction on direct or cross examination of otherwise protected testimony under the Deadman's Statute, not the other way around when the opposing party elicits the testimony. This interaction relied upon by Defendants is simply no authority for the Defendants' arguments of waiver by Sharon Rose who was asked these questions by the Defendants. Defendants cite *Hill v. Cox,* 110 Wn. App. 394, 41 P. 3d 495 (Div. III, 2002) as authority for a waiver, which makes no reference to the Deadman's Statute on any issue before that Court.

Defendants repeatedly try to resurrect their standing argument (Defendants Argument C, page 21) that the disputed 5 acre parcel was never included in the Joint Venture Agreement which was not an issued decided by the Trial Court but that attempt, again, must fail. The rebuttal to that argument is not repeated here.

E. Sharon Rose timely filed her causes of action within the applicable limitations period.

The applicable law is properly stated by Defendants, however we differ from its application to the facts. They start on page 24 of their Brief with the same argument of reliance upon the constructive notice of the recorded deed from PT III to the Zimmermans. Constructive notice of that transfer is not imposed as a matter of law on the Rose Joint Venture or the Roses individually because theirs was an antecedent interest. *Aberdeen Federal Savings & Loan Association v. Hanson,* 58 Wn. App. 773,777, 794 P. 2d 1322(Div. II, 1990). That means that contrary to the rule applicable to subsequent interests, since the Roses interest was antecedent, there was no duty imposed; they not having been constructively notified of anything. It is the same result when there is no recorded instrument as was held in *Busenius v. Horan,* 53 Wn. App. 662,668, 769 P. 2d 869 (Div. I, 1989). Absent this constructive knowledge, there was no reason for Sharon Rose to refer to the record under an inquiry duty since no evidence

was presented that she otherwise knew about the transaction until August 10, 2010.

The Trial Court seemed to think the testimony of the witnesses was that a title search had been undertaken or if it had been so undertaken the knowledge was discoverable. Conclusion of Law 2 was made without a Finding of Fact and cannot be sustained. *In the matter of the Estates of Waters,* 56 Wn. 2d 717, 355 P. 2d 8 (1960). If the trial Court concluded Sharon Rose should have sought a title report, it did not say so, nor is there any authority offered by Defendants for the proposition under these circumstances it was Plaintiff's duty to do so. The conclusion was offered by the Trial Court as additional justification of concluding that the transfer in July 2000 was discoverable by Plaintiff after reliance on the faulty basis that the Rose Joint Venture year 2000 tax return disclosed it. That information from the reported sale by AMJV of its interest in the disputed 5 acre parcel was not properly included in the Rose Joint Venture year 2000 tax return in any event. (IRS Reg.1.6031(b)-IT).

The Defendants then focus their arguments on the information obtained by two different attorneys, Megan Farr and J. Stuart Morgan. (Defendants' Brief page 25) The problem for this reliance is twofold. Megan Farr referred Sharon Rose to Attorney J. Stuart Morgan because she had no experience in the commercial area of the law. (RP70: 11-20).

Mr. Morgan after his extensive investigation by exchanging letters and a visit on site with the Semkes' interests two days before the FNIG lawsuit was filed by them, they never told Stuart Morgan of the lawsuit. Although he was not completely satisfied with the answers he received, could not recommend that a lawsuit by undertaken.(RP 330: 2-25, 331: 1-25). He testified further that if everything represented to him in response to his letters was accurate, that would have satisfied his concerns. (RP 328:5-23). None of the information disclosed by John Zimmerman Jr. in response to Stuart Morgan's letters ever disclosed that the disputed 5 acre parcel was taken out of the interested investment and conveyed to himself. (RP332: 18-25, RP 333: 1-6). Based on this undisputed testimony, Sharon Rose reasonably relied on her attorney Stuart Morgan to not make any further inquiries at that time of January 17, 2005. He was as satisfied as circumstances permitted by the representations of Mr. Zimmerman so she completely fulfilled her duty to inquire further at that time.

The Defendants cite *Douglas v. Stanger,* 101 Wn. App. 243, 2 P. 3rd 998 (Div. III, 2000) for the proposition that Sharon Rose must show she satisfied her burden. This is shown by Mr. Zimmerman's failure to disclose that he had acquired the disputed 5 acre parcel as his own property outside the 85 acre investment development when Mr. Morgan

asked him to forward copies of all documents showing the title to all properties at issue in the AMJV project in the letter dated December 17, 2009. He effectively sidestepped the question in his response as shown by the testimony of Stuart Morgan (RP 332: 18-25, RP 333: 1-6) in that he hid or concealed from Sharon Rose and her attorney that fact of the sale to himself which he was later forced to admit in August 2010.

Lack of knowledge of fraud is excused by this showing. See the holding in *Douglas v. Stanger, Id* at page 256. There was no evidence introduced that Sharon Rose knew of the conveyance at the time it occurred, other than constructive notice that does not apply to antecedent interests. *Aberdeen Federal Savings & Loan Association v. Hanson, Id* at page 777. The Defendants chart of the expiration of the respective statutes of limitation depicted on page 26 and 27 of Defendants Brief can be disregarded because of the false assumption under which all such dates were based, her actual or constructive knowledge of the disputed 5 acre parcel being conveyed by Mr. Zimmerman to himself.

Therefore since Sharon Rose did not have factual knowledge of the basis for her claims until August 10, 2010 a time after the disability of Robert Rose no earlier than June of 2004 and no later than August 2005, the discovery rule still applies. The holding in *Asuncion v. City of Seattle,* 151 Wn. App 1015(Div. I, 2009), a decision without published opinion

cited by Defendants which is improperly cited according to appellate rules, but it concurs that the discovery rule still applies. Sharon Rose only had this knowledge within three years of the actual filing of her initial complaint and should not be barred from that chance. The Trial Court was simply in error on the facts and the law.

F. The Defendants cannot avoid the tolling of the limitations periods under R.C.W. 4.16.190 by argument that the limitation periods had expired under the false assumption that she had actual or constructive knowledge of the facts necessary for accrual.

The disability of Robert Rose came as early as June, 2004 according to the statements in John Zimmerman's letter of January 27, 2005 to Stuart Morgan described in Mr. Morgan's testimony that in the opinion of John Zimmerman, Jr., Robert Rose was incapable of making decisions on his own behalf and Mr. Morgan concurred in his own opinion. (RP 312: 15-25, RP 313: 1-14). The Trial Court heard the testimony of Megan Farr that in her opinion that Robert Rose had contractual and testamentary capacity but lacked the ability to understand the transactions they had entered into by August 2005. (RP 349:4-23). The Trial Court reached the same conclusion that he no longer had contractual capacity no sooner than June 2004 and no later than August 2005. (Finding of Fact 2) . Sharon Rose did not discover by constructive notice or actual knowledge that the disputed 5 acre parcel had been

conveyed to John Zimmerman, Jr. in July 2000, until August 10, 2010 at the earliest. Therefore if the accrual of the causes of action was tolled by the effects of R.C.W. 4.16.190 by August 2005, the limitations period could not have expired as Defendants contend.

That brings us to address the question of whether the statute's tolling effects, ended on Robert Rose's death on March 18, 2008 or one year after as the Defendants contend. If it did not, then the dismissal of the Plaintiff's causes of action except for the breach of contract claim based on the applicable statutes of limitations cannot stand.

Even Plaintiff's cause of action for breach of an express trust applies the application of the discovery rule, a conclusion about which the Trial Court seemed uncertain. (Conclusion of Law 6) Although contractual in nature, the discovery rule applies by statute R.C.W. 11.96.060(1) and case law. *Gillespie v. Seattle First national Bank,* 70 Wash. App. 150, 855 P. 2d 680 (Div. I, 1993).

The Defendants' argument that R.C.W. 4.16.200 the Trial Court's Conclusion of Law 2 was correct that the tolling due to disability ended one year after Robert Rose's death on March 18, 2008, is simply contrary to law. The statute itself limits actions against a deceased person to one year from the claimants with no mention of claims being prohibited by the deceased person's estate that are made more than one year after the death

of the decedent as in the case before this Court. This was made clear by the Washington Supreme Court in *Young v. Estate of Snell,* 134 Wn. 2d 267, 278, 948 P. 2d 1291 (1997) where the Court stated:

> "R.C.W. 4.16.200. In our judgment, the limitations that are referred to are the limitations on the filing of claims against an estate" (emphasis supplied)

No authority is offered that a disability for tolling purposes terminates on death as Defendants argue (Defendants' Brief page 31). However it is undisputed in the evidence in this case that the disability never ended prior to Robert Rose's death. The Guardianship Statute comes into play only for the definition of a disability as provided in R.C.W.4.16.190 and its tolling applications.

Defendants argue to no avail that this definition suggests that Plaintiff's position should be denied is arguing that since a deceased person could not have a guardian appointed and that Robert Rose being disabled by the guardianship definition had no claims after his death or after one year thereof. Besides being a non sequitur, a guardian has the authority and the responsibility to administer the deceased ward's estate, just like a personal representative does. R.C.W. 11.88.150(2).

The remainder of Defendants argument (Defendants' Brief pages 32 and 33) are based on an erroneous interpretation of R.C.W.4.16.200 as previously stated and the lack of evidence that she either knew or should

have known and will not be repeated here. Sharon Rose is entitled to rely on R.C.W 4.20.046 which provides for the survival of all causes of action as any Personal Representative of a deceased person's estate does. Arguably that statute would also apply to the guardianship of a deceased person and claims that may have existed prior to the death of the ward as well.

G. The Trial Court improperly dismissed the breach of fiduciary claim on the grounds of *res judicata.*

The Parties agree that there must be the concurrence of identity in four respects: (1) of subject matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of persons for or against whom the claim is made. *Northern Pacific By. Co. v. Snohomish County,* 101 Wash. 686, 688, 172 P. 878 (1918). All four identities must be shown and are not present here by any reasonable review of the record. While true that some of the subject matter is the same as it pertained to Mr. Zimmerman, Jr. conveying a key portion of the disputed 5 acre parcel to his parents.

What is more significant is what was missing from the allegations of the complaint. For example there was no allegation in the Complaint that Mr. Zimmerman, Jr. conveyed the entire disputed 5 acre parcel to himself in 2000. (Ex 32). There were no allegations either that involved the Rose Joint Venture as Mr. Zimmerman, Sr., one of the Defendants in

that action testified. (RP 365: 21 to RP 367: 14). Additionally the ruling was improper as to the lack of identity in party or persons, privity or otherwise when the Trial Court should have considered that neither the Rose Joint Venture nor Robert Rose had any managerial or voting control in FNIG. (Unchallenged Finding of Fact 9).

Calling this 2010 lawsuit by FNIG against the Zimmermans (Sr. and Jr.) "identical" as Defendants do, (Defendants' Brief page 36) is a stretch of the concept of identical. The authority cited for the argument, *Lyle v. Haskins,* 24 Wn. 2d 883, 904, 168 P. 2d 797 (1946), is not supportive since that case and the holding applied only to agents, servants or employees of a party. Robert Rose was dead by the time this action was commenced and Sharon Rose as his Personal Representative could hardly be construed as fitting any of these categories for FNIG. Her participation in January 2010 related only to Mr. Zimmerman Jr.'s refusal to consider an offer that might have saved the 85 acre project. The tenuous connection of a minor interest in FNIG and the fact that her position against FNIG became adversarial once the facts were discovered, takes her out of the quality of person category for *res judicata* purposes for the identity of that element to be established. *Northern Pacific By. Co. v. Snohomish County, Id at page 698.*

Additionally, the argument that she elected to settle the lawsuit is plainly contradicted by the evidence. Mr. Zimmerman Sr. testified that not only were the issues not the same, but that Sharon Rose was not a signer to the agreement. (RP 366: 3-25, RP 367: 1-25). In any event, the settlement occurred on May 5, 2011 and her action was commenced within any statute of limitations period on February 28, 2013.

Defendants have not shown from this record how any of the four required identical elements have been shown for *res judicata* to bar any of Sharon Rose's actions as Defendants contend and the Trial Court concluded. Accordingly the dismissal on that ground should be reversed as contrary to law.

H. CONCLUSION IN REPLY

Defendants established no basis by way of their standing Arguments, which were not considered by the Trial Court to deny her claims on that basis. They have shown no discovery by Plaintiff's actual, constructive or lack of due diligence of the earlier factual basis for her causes of action. The testimony of communications and transactions between John Zimmerman, Jr. were properly excluded and not waived by the deadman's statute. The disability of Robert Rose tolled the accrual of the Plaintiff's causes of action except for her breach of contract claim. None of her claims were barred by the application of the doctrine of *res*

judicata. Therefore the decision by the Trial Court should be reversed and the case remanded for trial on the merits of the remaining causes of action

Reply Brief respectfully submitted this 21st day of August, 2015

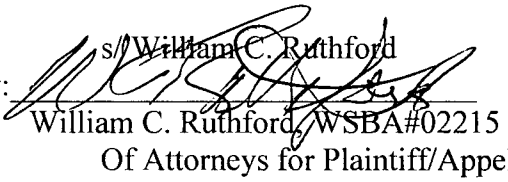
RUTHFORD & WOODBERY, PLLP

s/ John E. Woodbery

By: 

John E. Woodbery, WSBA# 8209

s/ William C. Ruthford

By: 

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Of Attorneys for Plaintiff/Appellant

III. ARGUMENTS IN RESPONSE TO CROSS APPEAL

A. The prevailing party clause was limited to an arbitration that was waived because the agreement was silent in other sections, particularly the remedies section, even if the agreement's subject matter served as a factual basis for the remaining causes of action.

The Rose Joint Venture Agreement prevailing party clause was provided only in Paragraph 18.10 and was silent in the Remedies Section, Paragraph 7.3 (Ex. 28). The case of *Shepler Construction, Inc. v. Leonard,* 175 Wash. App. 239, 306 P. 3d 988 (Div. I, 2013) cited by Defendants, does not hold as claimed that the prevailing party issue was decided in advance of a trial on remand. *Shepler Construction, Inc. v. Leonard,* Id at 249. When each party prevails on appeal on major issues, there may in fact at the eventual trial not be a prevailing party over all. *Puget Sound Service Corporation v. Bush,*45 Wash. App. 312, 320-321,74 P. 2d 1127 (Div. I, 1986). It is significant distinction in that case that there was an award of attorney's fees by the Trial Court.

Attorney's fees were specifically denied in this case by the Trial Court and Defendants failed to make that claim in their trial Brief filed on December 1, 2014. (See Supplemental Designation of Clerk's Papers of Appellant- pages not yet available for reference) Under these

circumstances, the more appropriate disposition of this issue of attorney's fees should be remanded to the Trial Court for application of the proportionality rule as is applicable even in contract cases where there are distinct and severable claims. *Cornish College of the Arts v. Virginia Limited Partnership, et al,* 158 Wash. App. 203, 231, 242 P. 3d 1 (Div. I, 2010). This is rule should be particularly applicable to this case even if the facts leading up to and the execution of the Rose Joint Venture served as a basis for Plaintiff' remaining tort or other claims, rather than to serve as a basis for deciding that issue on appeal. Only the portion pertaining to defense of the Plaintiff's breach of contract claim would be affected had the motion for fees been timely made.

B. No authority is presented to extend the attorney's fee provision in the May 2011 settlement agreement since neither the Rose Joint Venture, Robert and Wilma Rose nor Sharon Rose as Persoanal Representative of their estates were parties to the agreement and making that argument is not sustained by any law.

Appellant has already addressed why the settlement agreement was not *res judicata* sufficient to bar her remaining claims. The standing issue that would have resolved the extent, if any, why Sharon Rose had any interest sufficient to protect by intervention, settlement or otherwise, had it been considered in the Trial Court's decision. It was not. Additionally, the argument that

proportionality rule as is applicable even in contract cases where there are distinct and severable claims. *Cornish College of the Arts v. Virginia Limited Partnership, et al,* 158 Wash. App. 203, 231, 242 P. 3d 1 (Div. I, 2010). This is rule should be particularly applicable to this case even if the facts leading up to and the execution of the Rose Joint Venture served as a basis for Plaintiff' remaining tort or other claims, rather than to serve as a basis for deciding that issue on appeal. Only the portion pertaining to defense of the Plaintiff's breach of contract claim would be affected had the motion for fees been timely made.

B. No authority is presented to extend the attorney's fee provision in the May 2011 settlement agreement since neither the Rose Joint Venture, Robert and Wilma Rose nor Sharon Rose as Persoanal Representative of their estates were parties to the agreement and making that argument is not sustained by any law.

Appellant has already addressed why the settlement agreement was not *res judicata* sufficient to bar her remaining claims. The standing issue that would have resolved the extent, if any, why Sharon Rose had any interest sufficient to protect by intervention, settlement or otherwise, had it been considered in the Trial Court's decision. It was not. Additionally, the argument that she elected to settle the lawsuit is plainly contradicted by the evidence. Mr. Zimmerman Sr. testified that not only were the issues

not the same, but that Sharon Rose was not a signer to the agreement. (RP 366: 3-25, RP 367: 1-25). She had no managerial or voting control of FNIG (Unchallenged Finding of Fact 9) so why would she even be asked to consent? There is no evidence she became aware of the lawsuit until August 10, 2010 and absolutely none that she participated in the mediation that led to the settlement.

C. The Rules of Appellate Procedure, specifically RAP 7.2, do not change the result in this case.

The rules on appeal do give the trial court the authority to act on claims for attorney's fees, costs and litigation expenses but do not tell the trial Court to disregard its own civil rules of procedure. This rule merely clarifies older precedents that distinguished between ongoing events and re-doing the earlier Trial Court's decision which is for the Appellate Court's arena to decide. *Walkow v. Walkow,* 36 Wn. 2d 510, 512, 219 P. 2d 108(1950).

We suggest that the purpose of RAP 7.2(i) is to clarify this area of the procedural law and not allow a trial court to go back during an appeal and change the underlying decision basis the Appellate Court is asked to review. What makes more sense is that when a trial court has decided to award attorney's fees and litigation expenses but has not been presented with a motion and a factual basis to devised the reasonable amount, that an

appeal can proceed while the trial court finishes up what was already decided on the facts and the law if the time limits for those proceedings have not lapsed. We will show why in this case they had already elapsed.

D. The Defendants motion on February 19, 2015 was too late for the Court to reconsider or decide any differently whether attorney's fees could be awarded on the trial evidence and pleadings in this case.

Defendants' arguments that their motion was not untimely under CR 54(d)(2) confuses the procedural stages of this case. They try to argue that this Court's decision on February 27, 2015 on their Motion for fees and costs filed on February 19, 2015 avoids the problem of timeliness under CR 54(d)(2) because it was an order on February 27, 2015, not a judgment.

The Plaintiff nowhere contends that this Court's denial of attorney's fees on February 27, 2015, was a judgment rather than an order. What this Court did decide as a judgment was its decision filed on December 11, 2014 dismissing the Plaintiff's complaint. A dismissal with prejudice is undeniably a judgment. *Wagner v. McDonald,* 10 Wn. App. 213, 216, 516 P. 2d 1051 (Div. 1, 1973) The Defendants use this misstatement of that procedural status to raise a straw man argument to misapply the holding in *O'Neil v. City of Shoreline,* 183 Wn. App. 15, 23, 332 P. 3d 1099, 1104 (2014) to

contend that without prejudice, the ten day time limit to bring attorney fee and expense claims this Court relied on to some extent was not jurisdictional.

Plaintiff could argue she was prejudiced in her decision whether to appeal the Court's decision on December 11, 2014 when all proper reconsideration motions should be brought within ten days of the decision pursuant to CR 59(b). That way, the Plaintiff could properly weigh her decision whether to file a notice of appeal within thirty days of the final decision, so as to know what truly the final decision was. Plaintiff was also clearly prejudiced when the late filed Motion for an Award of Attorney's Fees and Costs was not designated as a CR 54(d) Motion or a CR 59(b) Motion for Reconsideration.

Additionally, Plaintiff challenged the procedural basis for the motion for fees and therefore did not waive that argument for this appeal.(See Plaintiff's Supplemental Designation for Clerk's papers for the Response pleadings of Plaintiff to the motion for fees and reconsideration of the denial filed 2/24/15 and 3/17/15 respectively)

However, that distinction of prejudice based on CR 54(d) is not dispositive of this issue. The Defendants waited 69 days after the Court's judgment on December 11, 2014 before bringing their

Motion for attorney's fees and expenses on February 19, 2015. Interestingly, Defendants Motion for Award of Attorney's fees and costs filed on February 19, 2015, even though late, nowhere mentions the Civil Rules under which it is brought. (CP 150-155).

Even if the time to bring a motion for attorney fees and costs is not limited to ten days under CR 54(d)(2), a thoughtful review of the nature of the Defendants' Motion leads any reasonable person familiar with the civil rules to see that the Motion they filed on February 19, 2015, 69 days after the decision, was in reality a motion to reconsider this Court's decision filed on December 11, 2014 and should have been governed under CR 59(b) and filed within ten days of the decision whether an order or judgment and a hearing held or otherwise considered within thirty days of the entry of the judgment.

That deadline was long past for filing or being considered when the motion for fees and expenses was filed on February 19, 2015. The very case the Defendants rely on to rescue them from their own neglect to timely bring their motion under CR 54(d), *O'Neil v. City of Shoreline,* 183 Wn. App.,15, 21-22, 332 P3d 1099 (Div. 1, 2014), held that whereas the ten day limit under CR 54(d) is not jurisdictional without prejudice being shown, CR 6(b)

specifically prohibits extending the time for taking action under among other rules and specifically states that CR59(b) is one of those rules. This is the rule governing the time limit for bringing a motion for new trial or reconsideration.

Arguably, the purpose of CR 54(d)(2) is to allow a prevailing party at trial who was awarded attorney's fees and costs to promptly bring his motion so that the case can be concluded and start the running of the appeals process, should that be a losing party's desire. On the other hand, when an error in the decision is believed to have occurred for the reasons stated in CR 59(a), the rules require a prompt application so that if an error has occurred it may be corrected at the trial court level. This was not done by Defendants who waited 69 days before bringing their motion which was in effect a motion for reconsideration without advising the Court of the procedural basis for it. They are responsible for the result that the Court rules and case authority demand. *O'Neil v. City of Shoreline,* Id.

The Defendants in their trial brief never asserted that there was a basis for a right of the prevailing party to recover attorney's fees by virtue of a contract provision of the Rose Joint Venture by way of an arbitration clause or otherwise but they did demand

attorney's fees under CR 11 and CR 11 only in their Trial Brief. (Defendants' Trial Brief, page 2 filed 12/1/2014 and designated as a Plaintiff's Supplemental Clerk's Paper on August 20, 2015 pursuant to RAP 9.6(a)CP). Attorney's fees under CR 11 though requested were specifically denied by the Trial Court's December 11, 2014 Decision at page 4.

No participant in the three day trial could suggest that any basis for attorney's fees under the arbitration clause of the Rose Joint Venture Agreement, other than under CR 11 was even mentioned. The only way to look at the motion filed on February 19, 2015 was asking for a new basis for relief by way of, in effect, a motion for reconsideration or a new trial. When the reality of these requests is examined, we suggest that it is simply too late to raise them now.

No authority has been shown to this Court that CR 6(b), which prohibits extending the time for a motion for reconsideration unless the court decides otherwise, by a timely request as specifically stated in the rule as prohibited, could possibly rectify Defendants' tardiness in bringing their motion. In this instance there was no such timely request. Consequently, since the Motion for fees and costs and the subsequently filed motion for reconsideration,

were denied by the Trial Court, even their argument that the dismissal of the Plaintiff's claims for breach of a contract on which they argue contained an available basis for an award of fees and costs has no merit. The Defendants simply waited too long to seek them.

E. CONCLUSION OF RESPONSES TO BRIEF ON CROSS APPEAL

The only possible basis for attorney's fees was the Rose Joint Venture Agreement which was limited to claims on arbitration which was waived by Plaintiff. The Defendants' application were time barred and that result is precluded. However, no authority is offered to establish such an award when each party potentially could prevail on major issues at trial on remand. The proportionality rule should be applied after a complete trial on the merits. Neither Plaintiff nor her deceased parents were parties to the mediation or settlement agreement of the FNIG lawsuit. No authority is offered that requires the attorney fee provision to a prevailing party in such an agreement in which they were not parties or participants. The Rules of Appellate procedure do not permit the trial court to continue to make changes to its judgment after the case is on appeal.

Defendants never asked the trial court to award attorney's fees based on the Rose Joint Venture Agreement. The motions they made were in effect motions for reconsideration and CR 6(b) in that circumstance precludes an extension if they had asked. The motions were too late, denied at trial and that ruling should be affirmed in this Court.

The Cross Appeal of Defendants should be denied.

Response Brief to Brief of Defendants on Cross appeal is respectfully submitted this 21st day of August, 2015

RUTHFORD & WOODBERY, PLLP

s/ John E. Woodbery

By: _____
John E. Woodbery, WSBA# 8209

s/ William C. Ruthford

By: _____
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Of Attorneys for Plaintiff/Appellant

NO. 47101-9-II

COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

SHARON D. ROSE, in her capacity as Personal Representative of the Estates of Wilma D. Rose and Robert D. Rose, deceased

Appellant

v.

JOHN C. ZIMMERMAN, JR. and SUSAN LASALLE, husband and wife and their Marital Community and FNM CORP., a Washington corporation

Respondents

DECLARATION OF SERVICE

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I, John E. Woodbery, one of the attorneys for Appellant in this case and a member of the Firm of Ruthford & Woodbery, PLLP and hereby certify under the penalty of perjury that on August 21, 2015, I caused by Special Messenger the original and a copy of the Appellant's Brief in Reply to the Brief of Respondent and a Response to the Respondents' Brief on Cross Appeal and a Copy of the Supplemental Designation of Clerk's Papers by Appellant, a copy of which is attached hereto as Exhibit A , to be filed in the Court of Appeals, Division II along with this Declaration of Service. In addition, the messenger service will deliver a copy of Appellant's Brief and the Supplemental Designation of Clerk's papers to the following:

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August 21, 2015

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